No. 1698

In the Supreme Court of the United States

October Term, 1983

D. E. Rogers Associates, Inc.,
and Michigan Specialties
Manufacturing Company,
Petitioners

v.

Gardner-Denver Company,
Respondent.

On Petition For Writ Of
Certiorari To The United States
Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Two courts have already found that this case of aggressive price competition did not involve any action by respondent Gardner-Denver Company ("Gardner-Denver") that violated the antitrust laws. Indeed, the Court of Appeals for the Sixth Circuit stated that "we are not prepared to punish under any guise conduct which we conclude was well within the competitive boundaries the antitrust laws were enacted to protect." (A-16.) Because the findings below were largely of fact, and because this case raises no conflict among the circuits or with prior decisions of this Court, this Court should decline to issue its writ of certiorari.

Petitioners' (hereinafter "Rogers") description of the price competition existing between Rogers and Gardner-Denver between 1964 and 1976 is basically accurate, except for attribution to Gardner-Denver of unproved "anticompetitive motives." In 1974, Rogers filed this case, alleging that Gardner-Denver had violated Section 2 of the Sherman Act, 15 U.S.C. §2, and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a). The case was tried to the district court without a jury, and was dismissed at the close of Rogers' proofs pursuant to Fed. R. Civ. P. 41(b). The district court held that Rogers failed to establish any violation of Section 2 of the Sherman Act or Section 2(a) of the Robinson-Patman Act. The district court found and concluded that: 1) the relevant product market included nutsetters of all kinds including ratchet wrenches and that there was no proof of monopoly power within that market (A-22 to A-24); 2) Rogers failed to show that any act of Gardner-Denver caused Rogers' alleged loss (A-24 to A-25); 3) Rogers had failed to show that Gardner-Denver priced its ratchet wrench replacement parts below average variable cost (A-25 to A-26); 4) there was no direct evidence of predatory intent (A-28 to A-29); and 5) the cost-based test for inferring anticompetitive effect from anticompetitive intent for purposes of §2(a) of the Robinson-Patman Act was

the same as that for determining intent to monopolize under Section 2 of the Sherman Act. (A-29 to A-30.)

The court of appeals did not reach the causation or relevant market issues, but affirmed the district court's other Sherman Act and Robinson-Patman Act findings and conclusions. Specifically, analyzing the case in terms of both an attempt to monopolize and monopolization, the court of appeals affirmed the finding of no direct evidence of intent or anticompetitive conduct from which predatory intent could be inferred. The court of appeals accepted the district court's finding that Gardner-Denver's reference to Rogers as a "pirate" manufacturer was a neutral description of a firm that manufactured replacements for equipment of another manufacturer and not evidence of predatory intent. (A-6.) The court held that Gardner-Denver was entitled to direct competitive price cuts at Rogers, and that Rogers had no right to force Gardner-Denver to maintain non-competitive prices. (A-7.).

The court also held that Rogers failed to show intent to monopolize by inference from predatory pricing, adopting the following test in the Sixth Circuit:

> [W]e hold that to establish predator [sic] pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

(A-9.) The court observed that Rogers' own expert could not say that Gardner-Denver's prices were below average variable cost, and that there was no other evidence sufficient to allow Rogers to carry its burden of showing that prices above average variable cost were predatory. (A-10.)

Finally, the Sixth Circuit held that where a plaintiff, like Rogers, sought to establish the "effect on competition" element of a Robinson-Patman §2(a) violation by inference from predatory pricing conduct, the test was the same as for monopolistic intent under §2 of the Sherman Act. (A-13 to A-16.)

ARGUMENT

I. ROGERS' "PREDATORY INTENT" ARGUMENT UNDER SECTION 2 OF THE SHERMAN ACT DOES NOT PRESENT ANY QUESTION WORTHY OF REVIEW, BUT MERELY ASKS THE COURT TO REVIEW THE EVIDENCE FOR A THIRD TIME.

This case does not present an issue worthy of review under Section 2 of the Sherman Act because of Rogers' crucial failure 1) to prove that Gardner-Denver priced its ratchet wrench replacement parts below average variable cost, or 2) to persuade either the district court or the court of appeals by direct evidence that Gardner-Denver had predatory intent. Rogers does not seriously argue a conflict among the circuits on the cost-based test of predatory intent. Instead, Rogers seeks a third review of the factual findings in contravention of the "two court" rule. *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635-36 (1967).

As Rogers correctly notes, claims of monopolization and attempted monopolization under Section 2 require proof of general intent to monopolize and specific intent to monopolize, respectively. In the absence of direct evidence of such intent, one way in which plaintiffs have sought to

infer intent to monopolize from defendant's conduct is to show that the defendant has predatorily priced its product. The lower courts have agreed that "[p]ricing is predatory when a company foregoes short-term profits in order to develop a market position such that the company can later raise prices and recoup profits." *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031-32 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

Every circuit since 1975 reviewing predatory pricing claims where the defendant's prices are below average total cost has adopted a cost-based test under which the courts may infer predatory intent from pricing activity. As Rogers concedes, no circuit addressing the issue has failed to designate average variable cost as the crucial factor: if the defendant prices its product below average variable cost (those costs which vary with changes in output), it will be presumed to have engaged in predatory pricing.[1] Here, both the district court and the court of appeals agreed that Rogers failed to prove that Gardner-Denver priced the products at issue below average variable cost. (A-26; A-10.)

Most of the circuits have left open the issue how plaintiffs can prove predatory intent where prices are greater than average variable cost. The Sixth Circuit has, in the present case, adopted the Ninth Circuit's explicit burden-shifting formula. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert.*

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[1] *D.E. Rogers Assocs., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982). *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

denied, 103 S. Ct. 57 (1982). If the defendant is shown to have priced its products above average variable cost but below average total cost (the total of fixed and variable costs divided by output), the burden is on plaintiff to show that the prices are predatory. If the prices are shown to be below average variable cost, however, the burden shifts to defendant to rebut the presumption that its prices were predatory. The other circuits have not yet addressed the burden-shifting test, but at least in cases involving prices lower than average total cost, the decisions among the circuits are not in conflict.[2]

In this case, Rogers failed to show intent to monopolize under any test. The district court and the court of appeals unanimously rejected Rogers' factual argument that there was direct evidence of predatory intent. (A-28; A-6.) Nor could either court find sufficient evidence from which predatory intent could be inferred. Within the context of the cost-based test adopted by the Sixth Circuit, Rogers could not satisfy its burden of showing that the prices were predatory, once it failed to show that Gardner-Denver priced below average variable cost.[3] Thus, the Sixth Circuit

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[2] Where prices are above average total cost, there may be a conflict among the circuits. In *Transamerica Computer Co. v. Int'l Bus. Mach. Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983), the Ninth Circuit held that a plaintiff could show direct evidence of predatory intent even where prices were above average total cost. The First and Sixth Circuits rejected that position in *Arthur S. Langenderfer, Inc., v. S.E. Johnson Co.*, 1984-1 Trade Cas. (CCH) ¶65,905 (6th Cir. 1984), and *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983). Because the lower courts in this case found that plaintiffs failed to show direct evidence of any predatory intent, that issue is not presented here.

[3] Rogers quibbles over the Sixth Circuit's definition of "variable cost." The court declined to adopt a uniform definition and merely held that how a court should classify costs depends on the facts of each case. (A-11). The court rejected, on the facts of this case, Rogers' attempt to impose a cost definition that its own expert would not adopt. (A-10.) That holding is consistent with other circuits' treatment of cost accounting issues, *see Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 89 n.19 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), and not worthy of review.

affirmed dismissal of Rogers' case, even though it adopted a test different from that used by the district court.

Not surprisingly, then, Rogers' argument to this Court reduces to a plea for a third review of the evidence. Neither the district court nor the court of appeals believed Rogers' assertion that there was "abundant evidence that [Gardner-Denver] was attempting to damage Rogers and other small competitors and deter entry by others." Petitioners' Brief at 26. Rogers has shown no reason why it should be allowed to argue that evidence a third time in this Court.

II. THE HOLDING OF THE COURT OF APPEALS THAT ROGERS FAILED TO MAKE THE REQUIRED "EFFECT ON COMPETITION" SHOWING UNDER THE ROBINSON-PATMAN ACT RESTED ON ITS AFFIRMATION OF THE DISTRICT COURT'S FACTUAL FINDINGS, AND WAS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEALS.

A. The Court of Appeals Affirmed The Finding That Rogers' Evidence Did Not Show That Price Discrimination Had Any Effect on Competition.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), prohibits the sale of goods at discriminatory prices where such sale has an anticompetitive effect. Rogers' claim is of "primary line" price discrimination: as a manufacturer on the same distribution level with Gardner-Denver, Rogers claimed that the alleged price discrimination caused it to lose business.

A claimant under the Robinson-Patman Act must prove anticompetitive effect resulting from price discrimination.[4] In primary line cases, a plaintiff must establish the "effect on competition" requirement by a general market analysis

[4] The existence of contemporaneous sales at different prices is not an issue in this case.

or by proof of anticompetitive intent from which the trier of fact may infer anticompetitive effect.[5] 16C von Kalinowski, *Antitrust Laws and Trade Regulation*, §29.01[4] (1983). As the district court and the court of appeals observed, Rogers did not undertake to prove effect on competition though a general market analysis. (A-30; A-14.) The lower courts further found that Rogers' evidence was insufficient to prove anticompetitive intent, either directly or under the cost-based test, from which anti-competitive effect could be inferred. Rogers' Robinson-Patman claim, like its Sherman Act claim, thus failed on its facts. Those factual questions are not worthy of another hearing.

B. The Court of Appeals' Application of the Cost-Based Test in a Robinson-Patman Section 2(a) Case Was Not in Conflict With Any Decision of This Court or of the Court of Appeals of Another Circuit.

Rogers claims that the court of appeals wrongly applied the cost-based test of predatory pricing in deciding whether "effect on competition" had been shown under Section 2(a). Rogers concedes, however, that the Sixth Circuit's application of the cost-based test is not in conflict with the holding of any other circuit. Petitioners' Brief at 14-15. Rogers claims instead that the decision conflicts with prior decisions of this Court. That assertion is not true.

First, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), cited by Rogers, involved geographic price discrimination, not predatory pricing. The Court held that the Robinson-Patman Act reaches price discrimination which erodes competition as well as price discrimination intended to have an immediate destructive impact. Moreover, the Court found that there was sufficient evidence from which

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[5] Rogers agrees that virtually all previous primary line price discrimination claims have been premised upon geographic price discrimination, in which the defendant sold at a lower price in areas where it competed with plaintiff than it did in areas where it had no competition. *See, e.g., Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). Rogers does not make a geographic price discrimination claim.

the jury could reasonably have found that the price discrimination would injure competition. That evidence included an analysis of the effect of below-cost pricing on the plaintiff and other competitors in the Salt Lake City frozen pie market. In the language that Rogers quotes out of context—that a particular price "was less than . . . direct cost plus an allocation for overhead" (*Id.* at 698)—the Court was merely describing one of the challenged prices. It was not stating a test for predatory pricing as a means of inferring anticompetitive effect from intent, in lieu of a market analysis (which Rogers chose not to undertake here). There is, therefore, no conflict between the court of appeals decision and *Utah Pie*.

Rogers also inexplicably cites several of this Court's decisions for the proposition that they "have upheld findings of price discrimination in violation of §2(a) with no proof at all of defendant's costs." Petitioners' Brief at 15. The existence of price discrimination is not an issue here; the only question is whether Rogers proved an anticompetitive intent sufficient to infer anticompetitive effect. None of the cited cases had anything to do with cost-based tests of predatory intent.[6]

Finally, the court of appeals correctly observed that the use of a cost-based test will not "immasculate" Section 2(a) of the Robinson-Patman Act. The cost-based test will be involved in §2(a) analysis only if the plaintiff chooses that

[6]In *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963), the Court held that a refiner-supplier of gasoline could not avail itself of the §2(b) "meeting competition" defense where it gave a discriminatory price to allow an independently-owned retail reseller to meet its retail competition. The Court held the defense to be applicable only to meet the price reductions of the supplier's own competitors. In *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), the Court held that the §2(b) defense was a complete defense, and not merely a rebuttable defense to the prima facie case of price differential. In *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945), the Court held that "basing point" systems of pricing constituted price discrimination within the prohibition of §2(a), and that there was sufficient evidence of the anticompetitive effect of the system to support the Commission's cease and desist order.

method, as Rogers did here, to prove the anticompetitive effect of price discrimination in a nongeographic, primary line case. Even then, the plaintiff must show price discrimination to satisfy §2(a), on the one hand, and monopoly power in a relevant market (or a dangerous probability of attaining such power) to prevail under Section 2 of the Sherman Act, on the other. The court of appeals has hardly "judicially repealed" Section 2(a), and the suggestion that it has is not worthy of review by this Court.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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